FILED
FEB 24 1995

No. 94-1267

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

THOMAS C. PREVETIRE,

Petitioner-Claimant,

V.

WEYHER-LIVSEY CONSTRUCTORS, INC.,

Respondent-Employer,

and

EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY,

Respondent-Carrier.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

Robert A. Rapaport, Esquire
Counsel of Record
Jimese L. Pendergraft, Esquire
KNIGHT, DUDLEY, DEZERN & CLARKE, P.L.L.C.
Smithfield Building, Suite 101A
6160 Kempsville Circle
Post Office Box 13109
Norfolk, Virginia 23506-3109
(804) 466-0464

Counsel for Respondents

February 24, 1995

LANTAGNE DUPLICATING SERVICES
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether an employee involved in the construction of a steam and electrical power plant, the primary purpose of which was to provide power for the Norfolk Naval Shipyard, is a "maritime employee" under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1988)?

TABLE OF CONTENTS

STATEMENT OF THE CASE 2

REASONS TO DENY THE WRIT 4

I. The court of appeals properly interpreted and applied this Court's precedent regarding the Longshore Act's "status" test to the facts of this case. 4

II. The decision of the court of appeals does not create a conflict between the Fourth Circuit and decisions of other circuits, namely, the decisions in Graziano and Hullinghorst 8

III. The decision of the Fourth Circuit is not in conflict with its decisions in Joyner, Price, and Pittman 11

CONCLUSION 15

TABLE OF AUTHORITIES

Cases:

Alabama Dry Dock & Shipbuilding Co. v. Kininess,
554 F.2d 176 (5th Cir.), cert. denied,
434 U.S. 903 (1977) 9

Boudloche v. Howard Trucking Co. Inc.,
632 F.2d 1346 (5th Cir. 1980),
cert. denied, 452 U.S. 915 (1981) 8

Bradshaw v. McCarthy,
3 BRBS 195 (1976), petition for review denied,
547 F.2d 1161 (3d Cir. 1977) 9

Brown & Root, Inc. v. Joyner,
607 F.2d 1087 (4th Cir. 1979), cert. denied, 446
U.S. 981 (1980) 12

Chesapeake & Ohio Ry. Co. v. Schwalb,
493 U.S. 40 (1989) 4-9, 12, 14, 15

Conti v. Norfolk & Western Ry. Co.,
566 F.2d 890 (4th Cir. 1977) 3

Graziano v. General Dynamics Corp.,
663 F.2d 340 (1st Cir. 1981) 9

Herb's Welding, Inc. v. Gray,
470 U.S. 414 (1985) 5, 6

Hullinghorst Industries, Inc. v. Carroll,
650 F.2d 750 (5th Cir. 1981), cert. denied,
454 U.S. 1163 (1982) 9

Humphreys v. Director, OWCP,
834 F.2d 372 (4th Cir. 1987) 8

Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (4th Cir.), cert. Denied, 439 U.S. 979 (1978) 9

Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978) 9, 13

Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977) 5

Odom Constr. Co. v. United States Dep't of Labor, 622 F.2d 110 (5th Cir. 1980) 11

P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979) 5

Pittman Mechanical Contractors, Inc. v. Director, OWCP, 35 F.3d 122 (1994) 12

Price v. Norfolk & Western Ry. Co., 618 F.2d 1059 (4th Cir. 1980) 8, 12, 13

Trotti & Thompson v. Crawford, 631 F.2d 1214 (5th Cir. 1980) 8

Warren Bros. v. Nelson, 635 F.2d 552 (6th Cir. 1980) 8

Statutes:

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3) (1988) 2, 5, 6, 8
33 U.S.C. § 903(a) (1988) 4

No. 94-1267

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

THOMAS C. PREVETIRE,
Petitioner-Claimant

v.

WEYHER-LIVSEY CONSTRUCTORS, INC.
Respondent-Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,
A MUTUAL COMPANY
Respondent-Carrier.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

Respondents, Weyher-Livsey Constructors, Inc., (hereinafter "Weyher-Livsey" or "Employer") and Employers Insurance of Wausau, a Mutual Company,

(hereinafter "Carrier")[1], by counsel, respectfully request that this Court deny the Petition for a Writ of Certiorari which seeks review of the Fourth Circuit's opinion below. The opinion of the Fourth Circuit in this case is reported at 27 F.3d 985 (4th Cir. 1994), and is reprinted in full in the Petition for a Writ of Certiorari at Appendix A.

STATEMENT OF THE CASE

Prevetire filed a claim for compensation benefits under the Longshore and Harbor Workers' Compensation Act (hereinafter "Longshore Act" or "LHWCA"), as the result of a work-related injury which he suffered on October 16, 1986. At the time of his accident, Prevetire was employed by Weyher-Livsey, as a pipefitter. He was working on a project involving the construction of a power plant located within the confines of the Norfolk Naval Shipyard, in Portsmouth, Virginia. The Employer and Carrier denied liability for compensation benefits under the LHWCA, asserting that Prevetire was not a "maritime employee" as defined in § 902(3) of the Longshore Act.

A hearing on Prevetire's claim was held before an administrative law judge on December 4, 1989. Following that hearing, the ALJ issued his decision and order on April 2, 1990. See App. D, pp. 24a-33a.[2] He denied Prevetire's claim under the LHWCA, holding that Prevetire lacked status as a maritime employee. The ALJ found that Prevetire's work as a pipefitter engaged in the construction of a power plant "does not qualify as having a 'realistically significant relationship to' traditional maritime activity involving navigation and commerce on navigable waters."

---

[1]A full listing of the parties is provided in the caption and in the "Parties" section of the Petition for a Writ of Certiorari. There are no parent or subsidiary companies to be listed, as required by Rule 29.1., for either respondent.

[2]References to the Appendix are to the Appendix contained in the Petition for a Writ of Certiorari filed on January 24, 1995.

App. D, p. 32a. (citing Conti v. Norfolk & Western Ry. Co., 566 F.2d 890, 895 (4th Cir. 1977)).

Prevetire appealed the decision of the ALJ to the Benefits Review Board (hereinafter "the Board"). In a decision and order dated May 12, 1993, the Board reversed the ALJ, holding that Prevetire was a "maritime employee" because he was engaged in the construction of a new power plant which was to supply steam and electricity to the shipyard. Therefore, the new power plant was maritime in nature and, as a result, Prevetire's work in constructing the plant was also maritime in nature. Further, the Board held that the construction of the power plant was essential to the shipyard's operation and therefore so was Prevetire's work in constructing the power plant. See App. C, p. 20a-21a.

The Employer and Carrier appealed the decision of the Board to the Court of Appeals for the Fourth Circuit. The case was decided on June 29, 1994. The court of appeals reversed the decision of the Board, finding that the Board's expansive view of maritime employment is inconsistent with the LHWCA and its 1972 amendments. See App. A, p. 8a. The court found that Prevetire was not engaged in maritime employment simply because the power plant being built would eventually provide steam and electricity to shipbuilding and ship repair operations. See Id. The activities being performed by Prevetire were not inherently maritime. "The nature of a particular job is, of course, defined in part by its location, . . . ; but to classify Prevetire's employment as maritime, merely because the power plant that he was helping to construct would lie on the seaward side of the shipyard's boundary, would blur together the 'situs' and 'status' requirements which Congress intended to make distinct." Id. at 10a. Thus, the court found that Prevetire's suggested construction of the LHWCA would effectively read the "status" requirement out of the Act. See Id.

Prevetire filed a Petition for Rehearing with Suggestion for Rehearing In Banc, arguing that the court's opinion

misconstrued prior decisions of the United States Supreme Court and is contrary to decisions of the Fourth Circuit and other federal appellate courts interpreting the LHWCA's status test. The original panel voted to deny rehearing. A member of the court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny the rehearing in banc. See App. B, p. 15a.

REASONS TO DENY THE WRIT

Prevetire has set forth insufficient reasons for this Court to grant a writ of certiorari in this case. The Court of Appeals for the Fourth Circuit did not misconstrue or misapply prior precedent of this Court, namely, Chesapeake & Ohio Ry. Co. v. Schwalb, 493 U.S. 40 (1989), and its decision is not in conflict with prior decisions of the Fourth Circuit or other circuit courts of appeals. Although the precise factual situation presented herein has not been addressed before, there is substantial precedent on this issue, which precedent was correctly interpreted by the Fourth Circuit. Therefore, the Employer and Carrier respectfully pray that this Court deny the Petition for a Writ of Certiorari.

I. The court of appeals properly interpreted and applied this Court's precedent regarding the Longshore Act's "status" test to the facts of this case.

The 1972 amendments to the Longshore Act expanded the covered situs shoreward to include injuries not only occurring on navigable waters, but those occurring on "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. § 903(a) (1988). Recognizing that this new situs provision created a broad geographic area of coverage, Congress also enacted a limiting provision so that employees injured on a covered

situs could only receive compensation under the LHWCA if they were an employee as defined in § 902(3). This section defines employee, in pertinent part, as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, ship builder and ship-breaker . . . ." 33 U.S.C. § 902(3) (1988). The statute, however, sets forth no definition of "maritime employment."

Since 1972, there have been four major Supreme Court cases which have attempted to define the term "maritime employment" in the context of a worker injured on land. See Chesapeake & Ohio Ry. Co. v. Schwalb, 493 U.S. 40 (1989); Herb's Welding, Inc. v. Gray, 470 U.S. 414 (1985); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979); and Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977). There have also been innumerable opinions from the courts of appeals, which have sought to determine Congress' intent in enacting the 1972 amendments and, thereby, define the limits of the term "maritime employment."

The Herb's Welding case discusses at length the purpose of the maritime employment requirement as well as its limitations.

> Expansion of the definition of navigable waters to include rather large shoreside areas necessitated an affirmative description of the particular employees working in those areas who would be covered. This was the function of the maritime employment requirement. But Congress did not seek to cover all those who breathe salt air. Its purpose was to cover those on the situs who are involved in the essential elements of loading and unloading . . . . While 'maritime employment' is not limited to the occupations specifically mentioned in § 2(3), neither can it be read to

> eliminate any requirement of a connection with the loading or construction of ships . . . . The amendments were not meant to 'cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity . . . .' We have never read 'maritime employment' to extend so far beyond those actually involved in moving cargo between ship and land transportation.

470 U.S. at 423-24 (citations and footnotes omitted). The Court re-emphasized that the maritime employment requirement is "an occupational test that focuses on loading and unloading." Id. at 424. Thus, the mere fact that the claimant worked on a covered situs or in a marine environment does not afford status under the Longshore Act.

The more recent Schwalb decision reaffirmed the vitality of the tests set forth in Herb's Welding and its predecessor cases. As stated by the court of appeals, this Court "has repeatedly held that, aside from the occupations specifically named in § 902(3), 'land-based activity occurring within the § 903 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel.'" App. A, p. 7a (quoting 493 U.S. at 45-46) (emphasis added)). "In Schwalb, the Court held 'that employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act' because they 'are engaged in activity that is an integral part of and essential to those overall processes.'" Id. at 8a. (quoting Schwalb, 493 U.S. at 47). Prevetire, however, asked the court of appeals to extend Schwalb and hold that a pipefitter who was employed in the construction of a power plant was engaged in work that was an integral or essential part of shipyard operations merely because the power plant would ultimately provide steam and electricity for the shipyard. The court properly determined

that such an expansive view of maritime employment is inconsistent with the LHWCA and its 1972 amendments.

In Schwalb, this Court held that railroad employees who maintained and repaired equipment used in the loading of coal from railcars onto ships, were an integral part of and essential to the overall loading and unloading process of the ships. The Court noted that while the machinery used was not operating properly, or was being repaired, the loading process stopped. Therefore, the repair work was an essential function covered by the LHWCA. See 493 U.S. at 47-48. In the present case, there is not the same essential connection between the work being performed by Prevetire and the operation of the shipyard. Although energy from the power plant would ultimately be used to run the shipyard's operations,[3] the shipbuilding and repair processes did not and would not have stopped without construction of a new power plant. The shipyard had existed for years without the power plant being constructed and would have continued its work, uninterrupted, even if the plant had never been built. Something is essential when it is indispensable or unavoidable. In the present case, the work being performed by Prevetire at the time of his injury was not indispensable to the operations of the shipyard. As stated by the court of appeals, Prevetire's pipefitting is far removed from traditional LHWCA activities such as longshoring, and was of a nature not significantly altered by the marine environment. See App. A, p. 9a. The only connection between Prevetire's work and traditional maritime activities is that power from the plant would eventually be used by the shipyard. Prevetire argues that this connection is enough to make the work he was performing essential to the operations of the shipyard. However, the Employer and Carrier maintain, as the court of appeals found, that this connection is too tenuous.

---

[3]Some of the electricity generated by the power plant was also to be sold to users outside the shipyard.

As noted by the court of appeals, if the power plant had been built just outside the shipyard's boundary rather than just inside it, as it easily could have been, Prevetire's job would not have changed at all. See App. A, p. 10a. The court of appeals properly determined that to hold Prevetire covered by the Longshore Act would "blur together the 'situs' and 'status' requirements which Congress intended to make distinct . . ., and would effectively read the 'status' requirement out of the Act." Id. (citing for comparison Humphreys v. Director, OWCP, 834 F.2d 372, 375 (4th Cir. 1987) ("Were we to read the . . . requirements so broadly as to embrace this claim, . . . we would come perilously close to eliminating it entirely."), cert. denied, 485 U.S. 1028 (1988)). Thus, the court of appeals properly applied the test set forth in Schwalb to the facts of this case and was correct in holding that Prevetire was not "'engaged in maritime employment' within the meaning of the Act, 33 U.S.C. § 902(3)." App. A, p. 11a.

II. The decision of the court of appeals does not create a conflict between the Fourth Circuit and decisions of other circuits, namely, the decisions in Graziano and Hullinghorst.

Prevetire asserts in his Petition for a Writ of Certiorari that the decision below creates a conflict between the Fourth Circuit and other circuits. In support of his assertion and in addition to the two cases specifically discussed, Prevetire notes a line of cases which have held that employees involved in the maintenance or repair of machinery utilized in the shipbuilding, ship repair, or ship unloading process, are covered under the Longshore Act.[4] The

---

[4]Warren Bros. v. Nelson, 635 F.2d 552, 556 (6th Cir. 1980); Boudloche v. Howard Trucking Co. Inc., 632 F.2d 1346, 1347 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981); Trotti & Thompson v. Crawford,, 631 F.2d 1214, 1220-21, n.5 (5th Cir. 1980); Price v. Norfolk & Western Ry. Co., 618 F.2d 1059, 1061 (4th Cir. 1980);

Employer and Carrier do not dispute the holdings in the noted cases. However, since the 1972 amendments, the courts have struggled to draw meaningful lines defining the scope of coverage under the LHWCA. Each case turns primarily upon its facts as they are applied to the law. Therefore, the Employer and Carrier maintain that the court of appeals' decision below is not in conflict with prior decisions of other circuits, and is specifically not in conflict with Graziano v. General Dynamics Corp., 663 F.2d 340 (1st Cir. 1981), or Hullinghorst Industries, Inc. v. Carroll, 650 F.2d 750 (5th Cir. 1981), cert. denied, 454 U.S. 1163 (1982).

Both of the cases relied upon by Prevetire as being in conflict with the Fourth Circuit's decision below, were decided prior to this Court's decisions in Herb's Welding and Schwalb. Accordingly, they should not be considered controlling precedent for purposes of determining whether a legitimate conflict exists between the circuits such as to warrant granting Prevetire's Petition for a Writ of Certiorari. The case at bar is factually distinguishable from both Graziano and Hullinghorst, and was decided correctly based on the controlling precedent of this Court.

In Graziano, the claimant was injured and subsequently died as a result of a lung disease contracted over years of employment with General Dynamics. The claimant was a maintenance-mason, whose duties "primarily involved the repair of masonry and shipyard buildings, but also included digging ditches, breaking up concrete with a jackhammer, laying cement, grouting, removing asbestos from pipes, repairing boilers and manholes, and cleaning acid tanks." 663 F.2d at 341. The court therein reversed the decision of the Benefits Review Board, denying coverage

---

Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978); Alabama Dry Dock & Shipbuilding Co. v. Kininess, 554 F.2d 176, 178 (5th Cir.), cert. denied, 434 U.S. 903 (1977); Bradshaw v. McCarthy, 3 BRBS 195 (1976), petition for review denied, 547 F.2d 1161 (3d Cir. 1977).

to Graziano, stating that the language of the 1972 amendments is broad and suggests an expansive view of coverage. See Id. at 342. In finding Graziano covered by the Act, the First Circuit stated:

> [t]he maintenance of the structures housing shipyard machinery and in which shipbuilding operations are carried on is no less essential to shipbuilding than is the repair of the machinery itself . . . Graziano's maintenance and repair of shipyard facilities was essential to the building and repairing of ships . . . [T]he shipbuilding process of General Dynamics would not have come to an immediate halt if Graziano's duties were not successfully discharged, but the failure to perform routine maintenance would have led eventually to a stoppage or curtailment of shipbuilding and repairs.

663 F.2d at 342-43.

Based on the above language, Graziano is distinguishable from this case. Graziano performed work upon traditional maritime facilities and the court found his work essential to the processes of building and repairing ships. The First Circuit stated that "Graziano's work was a necessary link in the chain of work that resulted in ships being built and repaired." Id. at 343. Prevetire's work, on the other hand, was not such a necessary link. The shipyard functioned prior to the construction of the power plant upon which Prevetire was working, and continued to function during the course of construction and Prevetire's work. Prevetire was not involved in the construction, maintenance or repair of any structures housing shipyard machinery or in which shipbuilding operations were carried on. His work was not essential to the traditional maritime activities of shipbuilding, ship repair, or the loading and unloading of ships. The failure of Prevetire to perform the work in question would not have led to either a stoppage or a curtailment of the shipyard's operations.

Likewise, Hullinghorst is also distinguishable. In that case, the claimant suffered a back injury while erecting a scaffold beneath a pier extending out over the Mississippi River. The sole purpose of the scaffold was to provide a place for other employees to stand in order to repair a turntable used in the loading and unloading of vessels. Although the claimant had no direct role in the actual repair work on the turntable, the Fifth Circuit found that "[t]he scaffolding work at issue in the present case was part of an ongoing pier repair project involving the repair of a turntable (affixed to the pier) used by longshoremen in the loading and unloading of ships." 650 F.2d at 756. The court found that the claimant's work in erecting the scaffolding was "an essential and indispensable step in the repairs to be effected." Id. Quoting an earlier decision of the Fifth Circuit, the court further found that the claimant's activities bore a "realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters' . . . ." 650 F.2d at 756 (quoting Odom Constr. Co. v. United States Dep't of Labor, 622 F.2d 110, 113 (5th Cir. 1980)).

In Hullinghorst, the claimant was directly involved in the repair of a piece of machinery, affixed to a pier, and used by longshoremen in the loading and unloading of ships. Prevetire's work, however, was not such an integral part of either the loading and unloading operations at the shipyard or the shipbuilding and repair operations. The Employer and Carrier continue to maintain that the Fourth Circuit correctly determined that Prevetire's work was not essential to the shipyard's operations and traditional maritime activities. Contrary to the position argued by Prevetire, the Employer and Carrier assert that both the First Circuit and the Fifth Circuit would have found that Prevetire did not meet the status requirement of the Longshore Act.

III. The decision of the Fourth Circuit is not in conflict with its decisions in Joyner, Price, and Pittman.

Prevetire argues in his Petition for a Writ of Certiorari that the decision below is in conflict with other decisions decided by the Fourth Circuit, primarily Brown & Root, Inc. v. Joyner, 607 F.2d 1087 (4th Cir. 1979), cert. denied, 446 U.S. 981 (1980); Price v. Norfolk & Western Ry. Co., 618 F.2d 1059 (4th Cir. 1980); and Pittman Mechanical Contractors, Inc. v. Director, OWCP, 35 F.3d 122 (1994). Both Joyner and Price were decided prior to this Court's decision in Schwalb, but all three are distinguishable from the facts of this case.

In Joyner, the employer was engaged as an independent contractor to construct an additional shipyard for building and servicing liquified natural gas vessels. The construction included the building of a permanent dry dock for building and repair of ships and related structures such as craneways and assembly areas. The new yard was built on filled land in an area that was formerly a shallow, navigable part of the James River. Joyner, a general excavation foreman, was killed by a tractor while supervising the loading of sand being used to grade the yard and backfill the concrete walls of the dry dock. Stewart, a painter/sandblaster, worked all over the project, and was injured while loading a generator and bags of sand onto a truck for transport to the dry dock. See 607 F.2d at 1089. The Fourth Circuit found that Stewart and Joyner were both engaged in building a dry dock and thus, were engaged in maritime employment. "We have held, under the earlier version of the Act, that employees building and repairing dry docks are engaged in maritime employment." Id. Interestingly, dry docks are a covered situs both prior to and subsequent to the 1972 amendments. As emphasized by the court of appeals, a dry dock is peculiarly a maritime facility. See Id. The claimants therein were not found to be engaged in maritime employment simply because they were engaged in the construction of shipyard facilities

critical to the entire shipyard operation, as suggested by Prevetire. Rather, both claimants therein were working to construct a traditionally maritime facility. Such facts are clearly distinguishable from the present case wherein the claimant was engaged in the construction of a power plant, which is not a traditionally maritime facility.

Prevetire suggests that it is noteworthy that the court of appeals did not even address its prior decision in Joyner in the decision below. It is not necessary that the court of appeals discuss and distinguish every one of its prior decisions which may be applicable in some fashion. As set forth above, Joyner is distinguishable on its facts from the case at bar. Therefore, the court of appeals did not need to consider or discuss Joyner. There is no irreconcilable conflict, as Prevetire asks this Court to find, because the court of appeals found a distinction between the construction of a dry dock, a traditional maritime facility, and the construction of a power plant, which is not a traditional maritime facility, and which has no maritime nexus except for its location.[5]

Prevetire also argues that the Fourth Circuit's decision in Price v. Norfolk & Western Ry. Co., 618 F.2d 1059 (1980), conflicts with the decision below. Price was injured while painting support towers for equipment used in the loading and unloading of vessels at the Sewells Point

---

[5]The Employer specialized in the construction of small power plants located in many parts of the country. During this same time period, the employer had four other power plants under construction. These included a hydroelectric facility in Idaho; a co-generation plant at the Red River Army Depot in Texarkana, Texas; a combined fuel, co-generation plant for Stone Container Corp. in Florence, South Carolina; and a garbage burning facility for Regional Waste Systems in Portland, Maine. The plant being constructed at Norfolk Naval Shipyard was not unique in any way as compared to the other power plants that had been constructed, or were being constructed, by the Employer. Furthermore, construction of the plant, nor Prevetire's own work, were affected in any way by the fact that the plant was near navigable water or was intended to provide power to a shipyard.

port facility. Relying on Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978), the court found that Price was engaged in "maritime employment," since he was painting a structure essential to the loading and unloading process. The court, therefore, held that a person who maintains longshoring machinery is covered under the Act. See Id. at 1061.

Price, although decided prior to this Court's decision in Schwalb, is consistent therewith, and does not affect the outcome of the present case. Prevetire was not engaged in work that is an essential part of loading and unloading ships or other longshoring activities. The court of appeals did not draw a distinction, as suggested, between ship repair/construction and ship loading/unloading. Rather, it found the work performed by Prevetire not essential to any of the shipyard's longshoring operations. The mere fact that power from the power plant being constructed by Prevetire would ultimately be used to support those operations is too tenuous a connection to establish coverage under the Longshore Act.

Finally, Prevetire argues that the Fourth Circuit's recent decision in Pittman is also at odds with the decision below. In that case, the claimant alleged that he sustained a back injury while working as a pipe welder for Pittman. At the time of his injury, he was assigned to a project on Pier 12 at the Norfolk, Virginia Naval Operations Base. Pittman had contracted to construct pipelines for the pier, which involved removing the old pipelines and replacing them with new pipelines. The pipelines were used to load fuel, steam and water onto the vessels when they were docked at the pier.

As in the present case, the court was called upon to determine whether the claimant met the "status" requirement of the Longshore Act. In analyzing the facts of the case, the court of appeals followed this Court's decision in Schwalb, which requires that for land-based activity to be

considered maritime employment, it must be an "integral or essential part of loading or unloading a vessel." 35 F.3d at 125 (quoting 493 U.S. at 45). As stated by this Court in Schwalb, "employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act." 493 U.S. at 47. The court of appeals found that the pipelines being installed and repaired by the claimant were the only available means of transport to load the supplies essential to the ships' operation. See 35 F.3d at 126. "The necessity of these items is demonstrated by the fact that Pier 12 could not be used for docking purposes while the pipelines were out of commission." Id. Therefore, as discussed by the court of appeals, Pittman is distinguishable on its facts from the present case. The longshoring operations in the shipyard were not out of commission while Prevetire performed his work in connection with construction of the power plant, and his work was not essential to those operations. Even though the LHWCA is to be liberally construed, Congress did not intend that every one who sets foot upon a covered situs be considered a maritime employee. Accordingly, the Fourth Circuit properly found that Prevetire was not engaged in maritime employment at the time of his injury and is therefore not covered under the Longshore Act.

CONCLUSION

For the foregoing reasons, the Employer and Carrier respectfully pray that Prevetire's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

WEYHER-LIVSEY CONSTRUCTORS, INCORPORATED and EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY

Robert A. Rapaport, Esq.
Counsel of Record
Jimese L. Pendergraft, Esq.
KNIGHT, DUDLEY, DEZERN & CLARKE, P.L.L.C.
6160 Kempsville Circle, Suite 101A
Norfolk, Virginia 23502
(804) 466-0464
Counsel for Respondents